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Supreme Court, U.S.
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No. 04-1427

IN THE

Supreme Court of the United States

SUSIE ROSS, *et al.*,

Petitioners,

v.

CITIFINANCIAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR CITIFINANCIAL RESPONDENTS

JOHN R. CHILES
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, AL 35203
(205) 251-3000

RICHARD H. SINKFIELD*
CHRISTOPHER J. WILLIS
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street NE
Atlanta, GA 30303
(404) 522-4700

* *Counsel of Record*

Counsel for CitiFinancial Respondents

195122

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the in-state Defendants in this action had been fraudulently joined, when Petitioners' claims against those Defendants were facially barred as a matter of law, on grounds that did not automatically dispose of all claims against the diverse Defendants.

CORPORATE DISCLOSURE STATEMENT

Defendants/Respondents CitiFinancial, Inc. and CitiFinancial Services, Inc. are wholly-owned subsidiaries of Associates First Capital Corporation, which in turn is ultimately wholly owned by Citigroup Inc., a publicly-traded corporation.

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INTRODUCTION

This Court's intervention is not warranted in this case. The Fifth Circuit properly held that this case could remain in federal court because the claims against the non-diverse defendants could not possibly succeed. The rule that Petitioners now assert – namely, that the fraudulent joinder doctrine requires a showing that a diversity-defeating defendant has *no connection* to a controversy (Pet. at 7) – is not supported by any decision from any Court of Appeals, and is not compelled by this Court's holding in *Chesapeake & O. Ry. Co. v. Cockrell*, 232 U.S. 146 (1914) or any other decision of this Court. Indeed, contrary to Petitioners' suggestion, the Fifth Circuit's opinion in this case has nothing to do with *Cockrell* and instead turns on the particular claims and defenses asserted by the parties. Neither *Cockrell* nor the broad principle that Petitioners urge this Court to adopt were presented to the Fifth Circuit in the initial briefing in this case, and neither issue is discussed in the Fifth Circuit's opinion. Because the Fifth Circuit's decision in this case is not in conflict with any precedent from this Court or any other Court of Appeals, there is no reason for this Court to grant the Petition for Certiorari.

STATEMENT OF THE CASE

Plaintiffs/Petitioners are Mississippi residents who obtained consumer loans from First Family Financial Services, Inc. (a lender that was later acquired by affiliates of CitiFinancial in late 2000) and/or CitiFinancial, Inc., dating back as far as 1973. In connection with some of their First Family loans, Petitioners purchased one or more voluntary credit insurance products, such as credit life insurance sold by Union Security Life Insurance Company

or American Security Insurance Company.[1] Petitioners are completely diverse in citizenship from the corporate Defendants/Respondents. The three individual Defendants/ Respondents (all branch-level employees of First Family) are Mississippi citizens.

Petitioners commenced this action in the Circuit Court of Claiborne County, Mississippi. On June 11, 2001, Respondents filed a Notice of Removal based on diversity jurisdiction (28 U.S.C. § 1332) and the fraudulent joinder of the three non-diverse individual Respondents (Jo Smith,[2] Tracy Mitchell and Darla Farmer). Petitioners filed a Motion to Remand. All parties – including Petitioners – filed motions seeking permission to engage in remand-related discovery.

The district court granted these motions and permitted the parties to conduct written and deposition discovery relevant to the Petitioners' alleged claims against the individual Respondents. After that discovery was completed, the parties filed briefs and evidentiary submissions in connection with the pending Motion to Remand.

The First Family loan documents Petitioners signed expressly and uniformly disclosed that Petitioners were not required to purchase credit insurance in order to obtain credit. Typical of these disclosures were boldface statements at the top of Petitioners' loan contracts, in a separate box, stating

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[1] Some of the Petitioners received loans for which they purchased no insurance at all.

[2] Jo Smith's name is frequently misspelled "Joe" in the record and in the caption of this case, as well as in the Petition for a Writ of Certiorari.

that "Credit Life and Credit Disability Insurance are NOT REQUIRED in connection with this loan." Many Petitioners signed election forms which provided that "CREDIT LIFE OR CREDIT DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN" and contained blocks where Petitioners initialed, stating that they wanted insurance. These forms also contained blocks, about an inch away from Petitioners' handwritten initials, where Petitioners could have indicated that they did not wish to purchase the insurance. In addition, the forms gave Petitioners a 15-day period to cancel their credit insurance and receive a full refund of the premiums.

For CitiFinancial loans, Petitioners signed documents with similar disclosures that credit life, disability, property, involuntary unemployment and other types of insurance were "*not* required . . . to obtain credit." (emphasis in original). These same documents quoted monthly payments for the loans without any insurance and had a line where Petitioners signed, indicating that they wanted insurance. The contracts also provided that the employees with whom Petitioners interacted were agents of the lender and insurance companies, and were "not acting as the agent, broker or fiduciary for Borrower on this loan."

Although Petitioners' Complaint generically asserted claims by all Petitioners against "the Defendants" collectively, there were no specific factual allegations whatsoever concerning the individual Respondents. Indeed, the individuals were mentioned only at the beginning of the Complaint, with their names accompanied by the allegation that each one "affirmatively and actively participated in, was involved with, [and] aided and abetted" unspecified

wrongdoing. These conclusory allegations were strongly refuted and contradicted by the actual facts in the record.

Through discovery, it quickly became evident that most of the Petitioners had never even met or heard of the individual Respondents, and/or did not know they had filed a lawsuit against the individual Respondents. Thus, the only Petitioners whose "claims" the district court needed to analyze in relation to the individual Respondents were Doris King, Karen Whitley, Chester Newman and Sharon White.

For the "substance" of their purported claims, Petitioners alleged that they had either been told that credit insurance was required, or had not been informed of its voluntary nature. However, all of the Petitioners had at least a basic education and ability to read, and some were college-educated. They were fully capable of reading and understanding the boldface disclosures concerning credit insurance. Nevertheless, Petitioners claimed that they did not read their loan documents, either before or after they signed them.[3] In addition, those few Petitioners who had dealings with the individual Respondents never alleged or testified that their interactions with those Respondents were anything other than typical, arms-length business transactions, not involving any special or unique relationships.

After considering the evidence and arguments, the district court entered a long, detailed Memorandum Opinion and Order denying Petitioners' Motion to Remand. Petitioners

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[3] Karen Whitley, one of the few Plaintiffs who alleged personal contact with the individual Defendants, actually made claims for benefits under her credit disability insurance, and those claims were paid.

filed a Motion to Reconsider, asking the district court to reverse its order or, in the alternative, to certify the order denying the Motion to Remand as a partial final judgment under Fed. R. Civ. P. 54(b). The district court addressed Petitioners' legal arguments in another Memorandum Opinion and Order, and declined to reverse its earlier ruling. However, the district court did amend its prior order to permit Petitioners the opportunity to appeal under 28 U.S.C. § 1292(b). Petitioners filed a Petition for Permission to Appeal, which was granted by the U.S. Court of Appeals for the Fifth Circuit.

After briefing and oral argument, a unanimous panel of the Court of Appeals affirmed the district court's order denying Petitioners' Motion to Remand, holding that the in-state defendants had been fraudulently joined because Petitioners' claims against them failed as a matter of law. *See Ross v. CitiFinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003). The Fifth Circuit's opinion focused on the issues that were briefed by the parties – the proper quantum of proof necessary for a finding of fraudulent joinder, and the viability of Petitioners' claims against the non-diverse Respondents under Mississippi law. Since Petitioners had not raised *Cockrell* in either the district court or their briefs to the Fifth Circuit, the Court of Appeals did not discuss or address it.

Petitioners filed a petition for rehearing *en banc*, asserting that the Court of Appeals' decision in the present case was in conflict with another Fifth Circuit decision, *Smallwood v. Illinois Cent. R.R. Co.*, 342 F.3d 400 (5th Cir. 2003), and for the first time raising the issue that removal had been improper because the basis for fraudulent joinder was allegedly a "common defense" shared by the diverse and

non-diverse Respondents. The *Smallwood* case was reheard by the Court of Appeals *en banc*, *see* 385 F.3d 568 (5th Cir. 2004), and after the *en banc* decision was issued, the Court of Appeals directed the parties to the present case to submit briefs on *Smallwood*'s impact on the present case, and in particular whether the basis for fraudulent joinder was a "common defense" or not. The parties did so, and the Court of Appeals then denied Petitioners' petition for rehearing *en banc* in the present case without opinion. Petitioners filed the present Petition for Writ of Certiorari in this Court.

SUMMARY OF ARGUMENT

There is no need for this Court to grant certiorari in the present case, simply because the Fifth Circuit's decision is not in conflict with this Court's precedent or any decision from any other circuit. Petitioners attempt to create the illusion of such a conflict by mischaracterizing the Court of Appeals' ruling and rationale, but their effort is ultimately unavailing.

The issue in this case concerns the fraudulent joinder doctrine (now known in the Fifth Circuit as "improper joinder"), which protects defendants' right to remove cases to federal court by guarding against procedural manipulation by plaintiffs in state court. In particular, the district court and Court of Appeals held that the Petitioners in the present case had fraudulently joined the individual Respondents in an attempt to defeat removal, as evidenced by the facial absence of any merit in the Petitioners' claims against the non-diverse Respondents. The Petition for Certiorari does not take issue with the Court of Appeals' conclusion that the claims against the in-state Respondents are without merit; rather, it urges this Court to adopt the broad view that

fraudulent joinder can only be established where the non-diverse Defendants have absolutely no connection to the controversy. *See* Petition at 7.

Petitioners seek to mischaracterize the Court of Appeals' holding in this case to place it into conflict with this Court's decision in *Chesapeake & O. Ry. Co. v. Cockrell*, 232 U.S. 146 (1914) and a number of decisions from other circuits. *Cockrell* held that a removing defendant cannot establish fraudulent joinder merely by denying the validity of the plaintiff's case as a whole. Petitioners did not even brief or argue *Cockrell* – or the broad principle of law they now assert – until the briefing in connection with the petition for rehearing *en banc*, which the Fifth Circuit denied without opinion. Thus, the Fifth Circuit's opinion in this case contains no discussion of any of the issues that Petitioners ask this Court to review.

The present case involves a very different situation than presented in *Cockrell*. Here, the basis on which the district court and Court of Appeals found fraudulent joinder was not a simple adjudication of the merits of the case as a whole, for two reasons. First, there were claims asserted by Petitioners in the present case (such as breach of contract) that apply uniquely to the diverse corporate Respondents, which were the only parties that entered into contracts with the Petitioners. Those claims were not addressed at all, much less conclusively adjudicated, by the lower courts' analysis of the fraudulent joinder issue.

Second, even where the diverse and non-diverse Respondents might assert a defense with the same legal label, such as the statute of limitations, the relevant underlying state law requires a defendant-by-defendant *factual* analysis to

ascertain the viability of the defense. For example, under Mississippi law, the Petitioners' claim that the statute of limitations was tolled because of "fraudulent concealment" requires a separate factual showing that each Defendant engaged in some subsequent, independent act of fraud which prevented Petitioners from discovering their cause of action. The lower courts' finding that Petitioners were unable to provide any evidence of fraudulent concealment by the individual Respondents does not foreclose Petitioners from attempting to show that the corporate Respondents, acting through other agents, might have engaged in fraudulent concealment.

Thus, the showing of fraudulent joinder in this case was directed solely to the Petitioners' claims against the non-diverse Respondents, and did not amount to a general denial of the Petitioners' claims against all of the Respondents. It is for precisely this reason that the Court of Appeals' decision in this case is not in conflict with *Cockrell*, or with any decision from the other Courts of Appeals. There is no reason for this Court to grant certiorari in this case.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision in this Case is Consistent with This Court's Decision in *Cockrell.*

Petitioners strive to create the appearance of a conflict between this Court's decision in *Cockrell* and the Fifth Circuit's decision in the present case, but any examination of *Cockrell* alongside the Fifth Circuit's decision reveals that no such conflict exists.

A. The Rule Announced in *Cockrell* is Narrow, and Applies Only When the Showing of Fraudulent Joinder Constitutes a General Denial of the Plaintiff's Case "As An Entirety."

The starting point of this analysis is, of course, *Cockrell* itself. In that case, the plaintiff sued a railroad company and two of its employees, claiming that the negligence of the two employees in operating the railroad had caused an accident at a grade crossing that resulted in the wrongful death of the plaintiff's decedent. *Id.*, 232 U.S. at 148. The railroad company attempted to remove the action on the basis of diversity of citizenship, and argued that its two non-diverse employees were fraudulently joined because the plaintiff's claims of negligence were "false and untrue" and could not be sustained at trial. *Id.* at 151. This Court held that removal of the case was improper, reasoning as follows:

> As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits

> of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants.

Id. at 153.

This passage from *Cockrell* reveals the two elements that were critical to this Court's decision in that case: (1) the liability of the diverse defendant in *Cockrell* was predicated *solely and entirely* on the conduct of the non-diverse defendants, and (2) the showing of fraudulent joinder "went to the merits of the action *as an entirety*" because "it indicated that the plaintiff's case was ill founded as to all the defendants." *Id.* (emphasis added).

B. The Fifth Circuit's Decision in the Present Case is Consistent With *Cockrell*.

The Fifth Circuit rejected Petitioners' argument that removal in the present case was barred by *Cockrell*. The reason is simple: the basis on which the district court found fraudulent joinder in the present case was based on specific defenses and evidence rather than an unsubstantiated general denial, and does not indicate that Petitioners' "action as an entirety" was "ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153.

1. Most of the Petitioners in this case asserted no claims against the individual Respondents.

With respect to the majority of the Petitioners in this case, the "defense" asserted by the non-diverse Respondents was that those Petitioners did not have any dealings

whatsoever with the non-diverse Respondents. The record reflects that most of the Petitioners either testified that they never interacted with the individual Respondents, or they stipulated that they had no claims against those Respondents. The Petition for Writ of Certiorari concedes this fact. *See* Petition at 5 n.2 (listing 10 of the 27 Petitioners as the "only plaintiffs . . . who asserted claims against the non-diverse agents.").

Obviously, the "defense" that the non-diverse Respondents asserted with respect to these Petitioners was not "equally dispositive" as to the diverse Respondents; the Petitioners who stipulated that they had no claims against the individual Respondents made no such stipulation with respect to the diverse Respondents. Thus, at the very outset, this case falls outside the *Cockrell* rule because the diverse Respondents' liability is *not* predicated solely, or even primarily, on the conduct of the non-diverse employees. This fact alone illustrates a critical distinction between the present case and *Cockrell*, and belies Petitioners' strenuous insistence that the Fifth Circuit failed to follow *Cockrell*.

2. The Statute of Limitations is Not a "Common Defense" Because It Depends On Individualized Factual Inquiries.

Of the few Petitioners who alleged that they had any dealings whatsoever with the individual Respondents, most had claims that were facially barred by the particular statute of limitations applicable to their claims – Miss. Code § 15-1-49. Each of these Petitioners attempted to circumvent the statute by relying on the Mississippi doctrine of fraudulent concealment, embodied in Miss. Code § 15-1-67. That statute provides that, when a defendant "shall fraudulently conceal

the cause of action from the knowledge of the person entitled thereto," the statute of limitations is tolled until the claim could have been discovered through reasonable diligence. The entirety of section II-B the Fifth Circuit's opinion in the present case was devoted to holding that, under Mississippi law, Petitioners were required to show that the individual Respondents engaged in subsequent, affirmative acts of concealment in order to invoke the tolling of the limitations period under § 15-1-67. Because there was no evidence that the individual Respondents engaged in any such acts of concealment, Petitioners could not rely on § 15-1-67 to save their claims against those Respondents.

The Fifth Circuit's holding that § 15-1-67 requires proof of affirmative concealment does not, however, necessarily and automatically dispose of the claims against the diverse Respondents. On the contrary, in order for the district court to ascertain whether those claims can survive, the Petitioners would have to testify about whether the diverse Respondents, acting through employees other than the handful of individual Respondents, engaged in any affirmative acts of concealment. At present, the record does not speak to that issue at all, because the parties' and the district court's focus was solely on the conduct of the individual, non-diverse Respondents. Because additional factual development is required before a determination can be made as to the claims against the diverse Respondents, the Petitioners' inability to prove "affirmative concealment" under § 15-1-67 against the non-diverse Respondents does not constitute a "common defense" that establishes a lack of merit in Petitioner's action "as an entirety."

3. Some of the Petitioners' Claims Against the Diverse Respondents Are Governed by a Different Statute of Limitations.

In addition to the Defendant-specific nature of the factual inquiry under § 15-1-67, the *Cockrell* rule also does not apply to the present case because some of the legal theories asserted by Petitioners' Complaint are governed by a different statute of limitations. In particular, Petitioners asserted claims for breach of contract and of the contractual duty of good faith and fair dealing, and claims that the contracts at issue were unconscionable.[4] These claims, of course, could never apply to the individual Respondents, because there was no contract between the individual Respondents and any of the Petitioners. There were, however, loan contracts between the diverse lender Respondents and the Petitioners, as well as insurance contracts between the diverse insurance company Respondents and the Petitioners. Those diverse parties could never assert the defense of lack of contractual privity – the defense most readily and obviously available to the non-diverse Respondents.

As to those contract-based claims, at least as far as they apply to the lender Respondents and relate to the Petitioners' promissory notes, Mississippi's tort statute of limitations does not apply. Rather, Miss. Code § 75-3-118(g) applies to these contract-based claims arising out of a promissory note. The existence of this separate statute of limitations, applicable solely to the claims against the diverse Respondents, puts this case squarely outside the scope of

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[4] There is no separate "breach of contract" count in the Complaints, but Paragraph 54 of each Complaint flatly alleges that "Defendants' conduct constitutes breach of contract."

Cockrell, again because the basis for finding fraudulent joinder did not dispose of Petitioners' case as a whole.

4. The Existence of a Fiduciary Duty is a Defendant-Specific Issue and Therefore Not a "Common Defense."

The improper joinder analysis with respect to Petitioners' claims for breach of fiduciary duty similarly requires a *separate* and individualized factual analysis for each Defendant. The Fifth Circuit's discussion of the fiduciary duty issue in its opinion in the present case makes this clear:

> [a]lthough Plaintiffs point to affidavits in which some Plaintiffs state they trusted and relied on Individual Defendants, none of this evidence shows circumstances *justifying* such reliance.

Ross, 344 F.3d at 466 (emphasis in original). The reason for the Court's focus on evidence showing circumstances justifying the reposing of trust and confidence is that Mississippi law does not presume the existence of a fiduciary duty in a loan transaction; rather, there must be clear and convincing evidence of special circumstances that give rise to a fiduciary relationship. *See, e.g., Deramus v. Jackson Nat. Life Ins. Co.*, 92 F.3d 274, 278 (5th Cir. 1996) ("relative to the creation of a confidential relationship, [Mississippi precedent] holds that there must be something about the relationship between the parties which would justifiably create an expectation on the part of one party that the other was protecting the first party from the occurrence of a particular risk").

The absence of a special relationship between the individual Respondents and the Petitioners does not, standing alone, negate the existence of such a relationship between the Petitioners and the diverse Respondents. The current record does not speak to the issue of whether circumstances creating a special relationship exist arising out of the Petitioners' dealings with the diverse Respondents through other employees not named as Defendants in this case. Just as will be necessary on the issue of fraudulent concealment and tolling of the statute of limitations, the diverse Respondents will have to develop the record further to provide the district court with evidence about the overall relationship between the Petitioners and the diverse Respondents.

Because Mississippi law requires a case-by-case factual inquiry about whether special circumstances justifying a fiduciary duty exist, there is no "common defense," such that the finding of fraudulent joinder would automatically and necessarily require summary judgment in favor of the diverse Respondents. Unlike the "no negligence" defense in *Cockrell*, the issue of the existence of a fiduciary duty in the present case cannot be resolved on an across-the-board basis. Because the non-diverse Respondents' showing that they did not have a "special relationship" with the Petitioners does not, by itself, dispose of the claims against the diverse Respondents, *Cockrell* has no application here.

5. Reasonable Reliance Is Not an Element of Petitioners' Contract-Based Claims Against the Diverse Respondents.

The final basis for the Fifth Circuit's finding of fraudulent joinder is that the Petitioners' fraudulent and

negligent misrepresentation claims against the individual Respondents failed as a matter of law because Petitioners could not reasonably rely on oral misrepresentations that were contradicted by their loan documents. *Ross*, 344 F.3d at 464-65. This defense, like all of the others, does not fall within the scope of *Cockrell* because it does not dispose of all claims against all Respondents. In particular, as noted above, Petitioners assert claims of breach of contract, breach of the contractual duty of good faith and fair dealing, and unconscionability. These claims can only apply to the diverse Respondents, who (unlike the individuals) actually entered into contracts with the Petitioners. Reasonable reliance is *not an element* of any of these contract-based claims. Once again, the fraudulent joinder analysis engaged in by the district court and this Court on this issue does not "indicate[] that the plaintiff's case was ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153. Because there are other claims against the diverse Respondents that are not affected by the reasonable reliance analysis, this is not the kind of "common defense" that precludes a finding of fraudulent joinder under *Cockrell*.

II. There is No Circuit Split.

Petitioners also argue that the Fifth Circuit's decisions in *Smallwood* and *Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 696 (5th Cir. 2004), as well as the decision in this case, are in conflict with decisions from other circuits. *Smallwood* and *Rainwater*, of course, are not presently before this Court, and it is inappropriate for Petitioners to ask for an indirect review of those decisions through the present case, especially since this Court already declined to review *Smallwood* itself.

There is no conflict, moreover, between the result in the present case and any of the cases from other circuits cited by Petitioners. An examination of those cases reveals that they are precisely in accord with the Fifth Circuit's decision in this case.

Petitioners lead off by citing *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), a decision that was cited and relied upon by the Fifth Circuit in *Smallwood*. *See Smallwood*, 385 F.3d at 575. *Boyer* simply held (in a manner identical to the Fifth Circuit in *Smallwood*) that, when a showing of fraudulent joinder is predicated on a defense that involves "identical legal and factual issues" applicable equally to the diverse and non-diverse defendants, *Cockrell* precludes removal. *Id.*, 913 F.2d at 113. The defense in *Boyer* was a release that applied, if at all, to bar all claims against all defendants.

Similarly, the cases cited by Petitioners from the Eighth and Ninth Circuits involve situations where the asserted basis for fraudulent joinder would, if accepted, dispose of all claims against all defendants. *See Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (removal improper when "the assertion made by the removing defendant 'went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants.'") (quoting *Cockrell*); *Huffman v. Baldwin*, 82 F.2d 5, 8 (8th Cir. 1936) (rejecting claim of fraudulent joinder when the removing defendant made a "general denial of negligence" that "affected all defendants").

What Petitioners have not done – and cannot do – is cite any case from any other circuit in which a Court of Appeals

applied *Cockrell* to a situation in which the basis for fraudulent joinder did not equally apply to bar all claims against all defendants. Quite simply, there is no conflict between the Fifth Circuit's decision in this case and any decision from any other Circuit, making this Court's intervention completely unnecessary.

CONCLUSION

For the foregoing reasons, the CitiFinancial Respondents respectfully submit that this Court should deny the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

JOHN R. CHILES
BURR & FORMAN LLP
3100 SouthTrust Tower
420 North 20th Street
Birmingham, AL 35203
(205) 251-3000

RICHARD H. SINKFIELD*
CHRISTOPHER J. WILLIS
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street NE
Atlanta, GA 30303
(404) 522-4700

* *Counsel of Record*

Counsel for Respondents CitiFinancial, Inc., CitiFinancial Services, Inc., Jo Smith, Tracy Mitchell and Darla Farmer